



International Sales

Contractual Instruments Standard Terms and Conditions



Background

**What is a Letter of
Offer and Acceptance
(LOA)?**



Background

What is a LOA?

The FMS program is conducted using formal **contracts** between the USG and an authorized foreign purchaser. These **contracts** are **LOAs**. SAMM C4.1



Background

What is a contract?



Background

What is a contract?

An **agreement with specific terms** in which there is a **promise** to do something in return for a valuable benefit known as consideration.

Bilateral contract involves exchanging a promise for a promise.



Basic Contractual Elements

1. OFFER

2. ACCEPTANCE

3. CONSIDERATION

4. COMPETENT PARTIES

5. LAWFUL PURPOSE

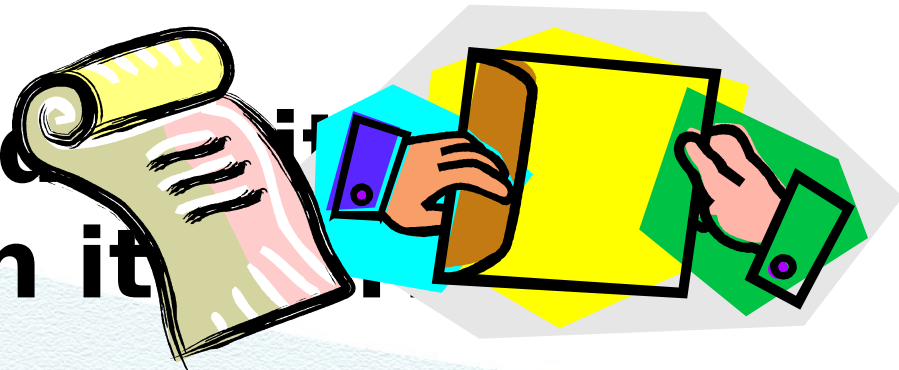
***6. TERMS &
CONDITIONS***



Offer

A proposal to enter a contract

- **Must intend to contract**
- **Must communicate to offeree**
- **Must be certain in its terms**





Acceptance

- **Can only be made by offeree**
- **Must be communicated in a reasonable manner**
- **Must be identical with terms of offer**
- **Absolute & Unconditional**





Consideration

Price paid for a promise

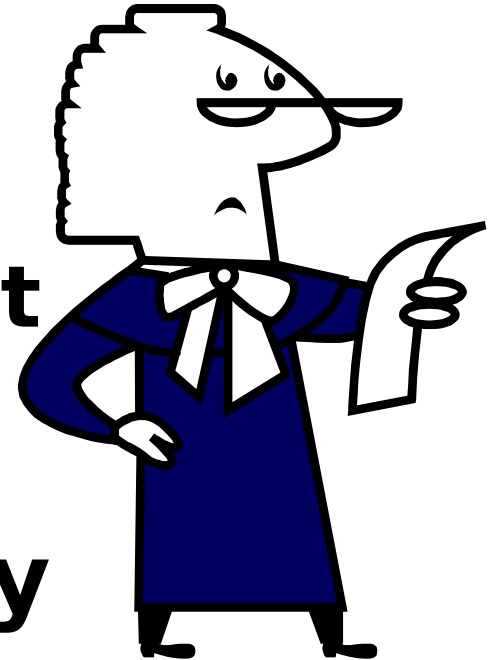
- **Must have value**





Competent Parties

- **Must possess legal capacity to contract**
- **Legal incapacity**
 - **Not authorized agent**
 - **Duress**
- **Contract voidable by incompetent party**





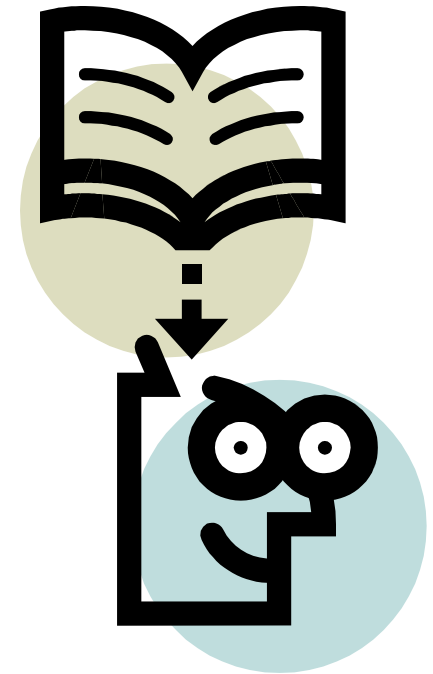
Lawful Purpose

**A contract is not
recognized if its
purpose is unlawful
or criminal**



Terms and Conditions

- **Terms must be clear enough to specify agreement on:**
 - **WHO**
 - **WHAT**
 - **WHERE**
 - **WHEN**
 - **HOW**



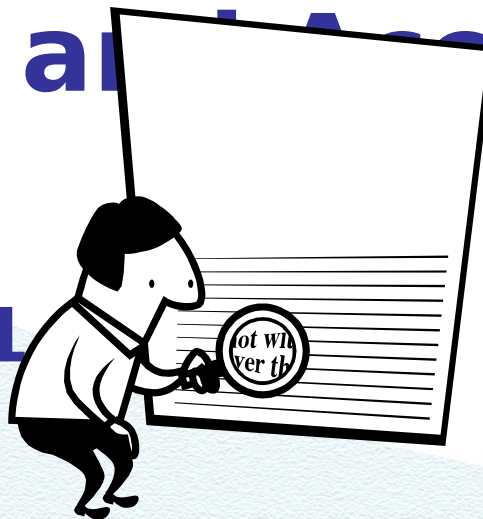


Standard Terms and Conditions

Standard Terms and Conditions are an official part of each AECA Letter of Offer and Acceptance (LOA)

SAMM

C5.4.8.1





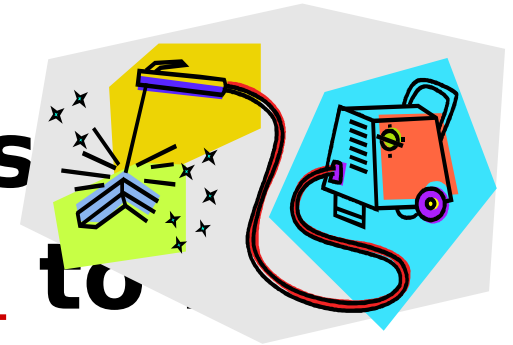
Standard Terms and Conditions

- 1. Conditions -- USG Obligations**
- 2. Conditions -- General Purchaser Agreements**
- 3. Indemnification And Assumption Of Risks**
- 4. Financial Terms And Conditions**
- 5. Transportation And Discrepancy Provisions**
- 6. Warranties**



1. Conditions - USG Obligations

1.1 Unless otherwise specified, items standard to



1.2 Normal USG procurement policies and procedures apply to FMS



Foreign Military Sales Buyer/Seller Relationships

United States Government

**Privity
LOA**

**Privity
CONTRACT**

**Foreign
Government**

**United States
Contractor**



1. Conditions - USG Obligations

1.3 USG will use “best efforts” to provide items for dollar amount and within availability cited

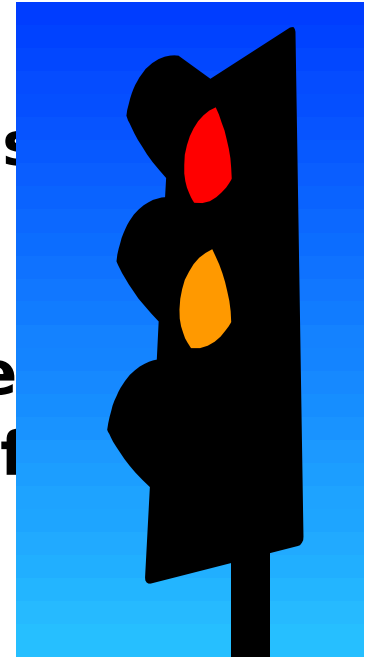




1. Conditions - USG Obligations

1.4 Under unusual and compelling circumstances, USG may cancel/suspend all or part of LOA prior to delivery

- **USG responsible for termination costs**
- **USG termination of contracts with suppliers should not to be construed as cancellation or suspension of**





1. Conditions - USG Obligations

1.5 U.S. personnel will not perform duties of a **combat nature**

1.6 U.S. **personnel assignments will not take into account race, religion, national origin, or sex**

1.7 LOA could be available for public inspection consistent with U.S. national security

- **SAMM C3.4.1**



2. Conditions - General Purchaser Agreements

2.1 Purchaser may **cancel LOA or **delete** items prior to delivery**

- Purchaser responsible for cancellation costs

2.2 Purchaser agrees to **use defense articles sold only for purposes specified**

- Mutual defense assistance agreement
- Bilateral or regional defense treaty
- Internal security
- Self-defense
- Civic action





2. Conditions - General Purchaser Agreements

**2.3 Purchaser will not, without prior
USG written consent,**

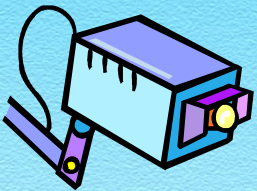
- **Transfer *title* of items**
- **Transfer *possession* of items**
- **Permit items to be used for
*unauthorized purposes***

**Purchaser will ensure
respect for proprietary
rights**



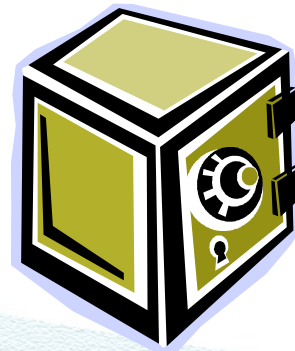


2. Conditions - General Purchaser Agreements



2.4 Purchaser will maintain **security of classified items **equivalent** to USG measures**

- Responsibility extends to items furnished to purchaser's contractors
- Purchaser agrees to use appropriately cleared commercial transportation agents





3. Conditions - Indemnification and Assumption of Risks

- **INDEMNIFY**

to guarantee against any loss which another might suffer

Example: one party may agree in advance to pay any potential claims which may arise from the contract

- **HOLD HARMLESS**

a promise to pay any costs or claims which may result from an agreement

One party agrees to cover all unknown lawsuits or claims stemming from the contract

Source: law.com Dictionary



3. Conditions - Indemnification and Assumption of Risks

3.1 USG provides items on a **non-profit basis for the benefit of the Purchaser; therefore:**

- Purchaser indemnifies and holds harmless USG, its agents, officers, and employees for loss or liability

3.2 Subject to contractual warranties, purchaser relieves USG contractors and subcontractors from liability for loss or damage

To the same extent USG would assume for its property if it were procuring items for itself



3. Conditions - Indemnification

FMS Case BN-D-YCY

Internal Level of USG Financial Risk

2007



**Before
FMS Sale**



=

2011



**After
FMS Sale**



4. Financial Terms and Conditions

- 4.1 LOA cost, availability, payment schedule, and delivery projections are **estimates** based on best available data**
- Price billed at **total cost**
 - USG will use “**best efforts**” to advise of
 - Cost increases in excess of 10% of total LOA value
 - Payment schedule changes
 - Delays significantly affecting delivery dates
 - **Failure advise does not change responsibility to pay**





4. Financial Terms and Conditions

4.2 USG will **refund excess payments**

- Unless purchaser not made payments on other LOAs

4.3 Failure to make timely payments may result in:

- delivery delays
- storage costs
- increased contract costs
- contract termination at purchaser's expense





4. Financial Terms and Conditions

4.4 Purchaser agrees to:

- Pay **total cost** even if cost exceeds LOA estimate
- Pay in **U.S. dollars**
- Pay billed amount in full on date specified
- Pay interest on arrearages
- Designate its procuring agency and paying office





5. Transportation and Discrepancy Provisions

5.1 Delivery and passage of title normally occur at initial point of shipment

- Procurement: manufacturer's loading facility
- Stock: U.S. supply depot
- If LOA specifies an alternate delivery point, title still transfers at initial point of shipment
- USG disclaims liability for damage or loss incurred after passage of title
 - Irrespective of transportation means

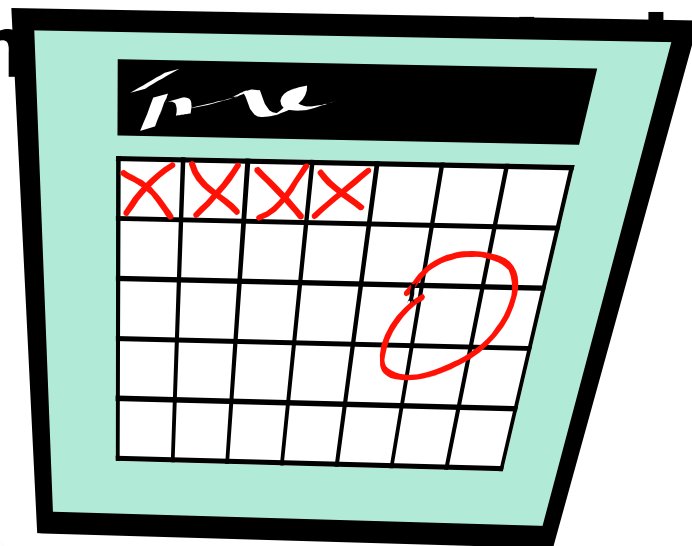




Delivery Schedule

SAMM C5.4.8.4

When the Purchaser's program requires that items/services not be performed earlier than a specified date, this must be noted in the LOA notes.

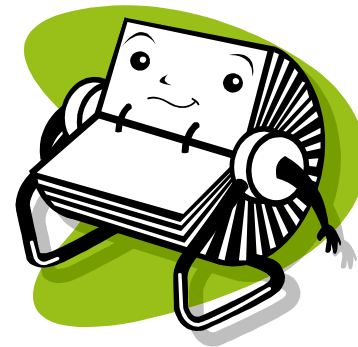




5. Transportation and Discrepancy Provisions

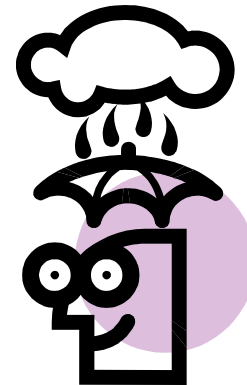
5.2 Purchaser provides shipping instructions

- **Mark for code**
- **Freight forwarder code**



5.3 Purchaser is responsible for obtaining:

- **Insurance coverage**
- **Customs clearance**





5. Transportation and Discrepancy Provisions

5.4 Quarterly billing statement or other delivery documents serve as evidence that title has passed and items have been delivered



- **Supply Discrepancies**

- No claims related to items of **\$200** or less
- Claims must be received within 1 year from **passage of title**
- Non-shipment/non-receipt of entire lot claims must be received within 1 year from passage of title **or 1 year from initial billing**
- Discrepant articles must be returned within **180 days** from USG direction to return



6. Warranties

"Written guarantee of the integrity of a product and of the maker's responsibility for the repair or replacement of defective parts"

Webster's New Collegiate Dictionary

"A promise or affirmation given by a contractor to the government regarding the nature, usefulness, or condition of the supplies or Performance of services furnished under the contract"



6.1 Warranties

Items from Procurement

- **USG warrants clear title**
- **USG does not warrant item serviceability**
- **USG will attempt to **procure warranties** requested by purchaser**
- **Purchaser will be **charged for the cost** of special warranties and for cost to exercise special warranty**





6.2 Warranties

Items from Stock

- **DoD will *repair or replace* articles from stock that are:**
 - **Damaged or defective & deficiency existed prior to passage of title**
 - **Defective in design such that item cannot be used for purpose designed**
 - **Unless condition was identified as other than serviceable**





Warranties

SAMM C6.3.8

- **DoD acquires the same warranties for FMS as it does for DoD**
- **Routine** FMS warranty rights exercised by the supply discrepancy process
 - **No special actions required by purchaser**
- **Exceptional** warranties obtained on purchaser request will:
 - **Be described in a supplemental LOA note**
 - **Note will include information on process necessary to exercise warranty rights**



7. Dispute Resolution

- **7.1 LOA subject to U.S. federal procurement law**
- **7.2 Disagreements between USG/purchaser regarding LOA resolved without referral to any international tribunal or third party for settlement**





International Sales Contractual Instruments

**Revisions and Other
Documents**



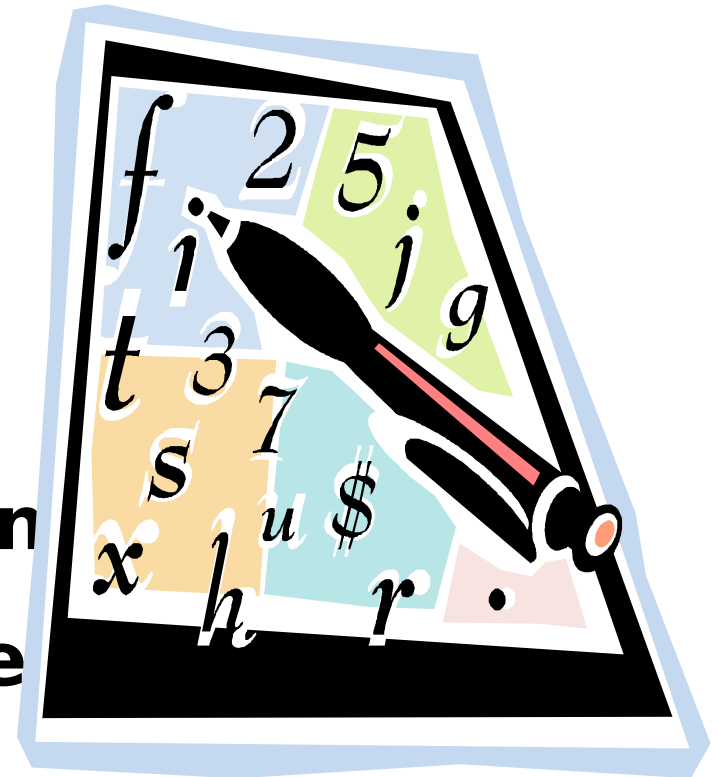
Government-to-Government Agreements

- 1. Amendment to LOA**
- 2. Modification to LOA**
- 3. Letter of Intent (LOI)**
- 4. Lease**
- 5. International Agreement**



LOA Items Subject to Changes

- **Price**
- **Quantity**
- **Configuration**
- **Delivery Date**
- **Training Requirements**
- **Transportation Code**
- **Financial Terms**
- **Supplemental Conditions**





Definition of Scope

**The basic intention,
goal, or purpose of
the agreement**



Amendment, Modification, New LOA?

SAMM C6.7

LOA Changes

**Major
Scope
Change**

**New
LOA**

**Purchaser
Acceptance
Required**

**Minor
Scope
Change**

**LOA
Amendment**

**No
Scope
Change**

**LOA
Modification**

**Purchaser
Acceptance
Not
Required**



New LOA

BN-D-YCW



- **Major changes in scope**
- **Require purchaser acceptance**
- **Examples: Addition or deletion of Significant Military Equipment or a substantial program expansion**



Amendments to LOA

- **Minor changes in scope**
- **Require purchaser acceptance**
- **Examples: Increases or decreases in blanket order cases, changes in performance periods, configuration changes, quantity changes**





Modifications to LOA



- **Changes not affecting scope**
- **Purchaser already agreed to these type changes in LOA 4.1**
- **Purchaser signature **only to acknowledge** receipt**
- **Examples: price increase or reduction, payment schedule change**

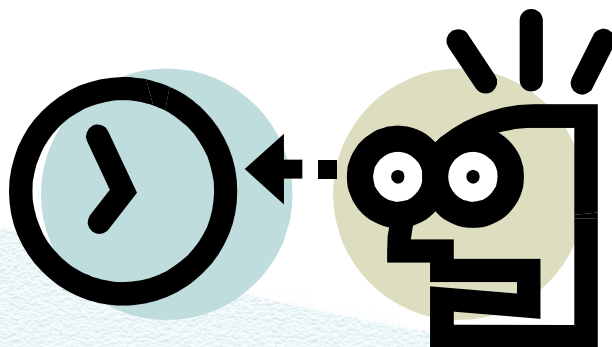
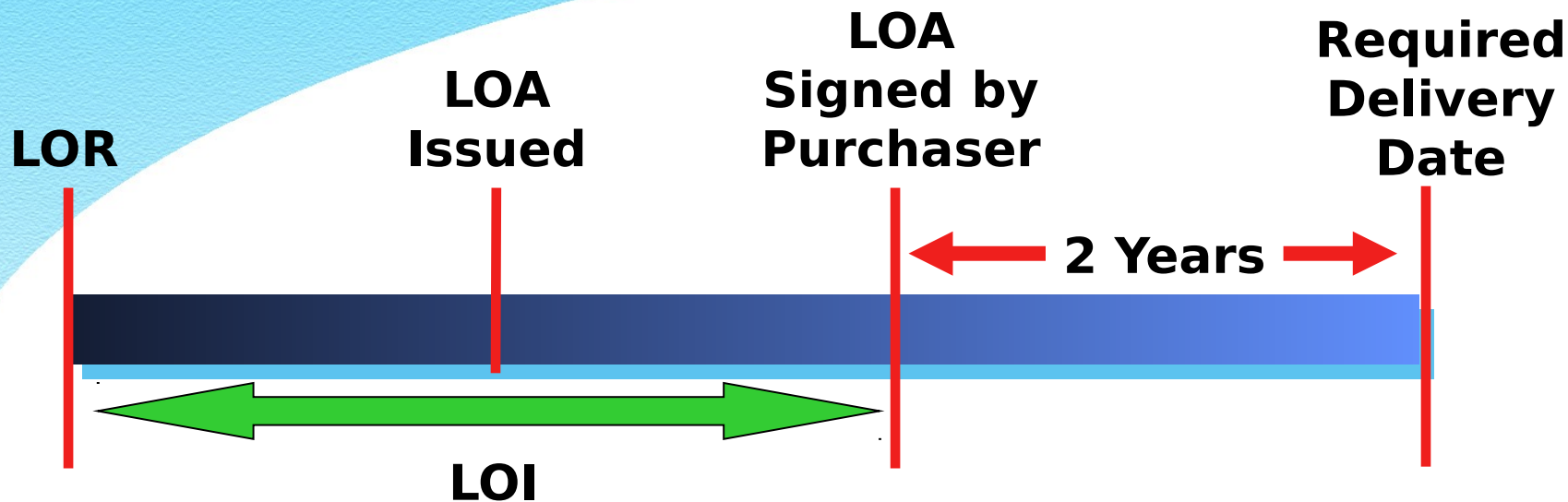


Letter of Intent (LOI)

Used to finance procurement of long lead-time items prior to issuance of LOA, or between LOA issuance and acceptance



Letter of Intent (LOI)





Lease

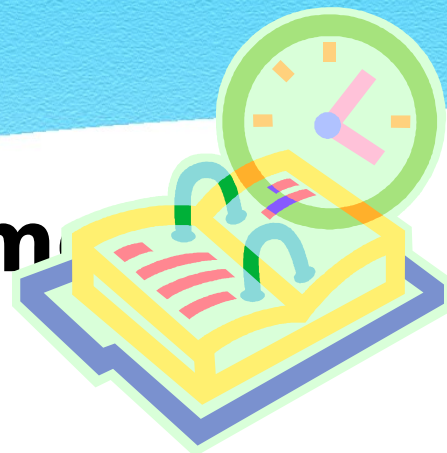
FMS is norm, Lease is exception

- **Recipient eligible for FMS**
- **Compelling foreign policy or national security reasons for lease vs. sale**
- **Articles not currently needed for public use**
- **Effect on U.S. technology/industrial base considered**





Lease



- **Fixed duration - Min of 1 m to max of 5 years**
 - **Title does NOT transfer**
 - **U.S. may terminate at any time for immediate return**
 - **Reimburse USG if article lost or destroyed while leased**
- **Congressional notification - Lease 1 year or more:**
 - **15 days for NATO, NATO members, Australia, New Zealand and Japan**
 - **30 days all others**



Lease

- **Recipient pays:**

- **Lease** - Depreciation rental

- Initial Deposit
- Quarterly payments



- **LOA** - packing, crating, handling, transportation, support, repair, damage, loss

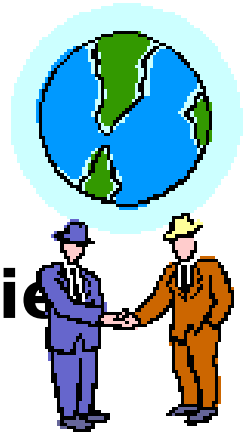
- Related LOA referenced in lease agreement





International Agreement

- **LOA** typically sufficient for most FMS sales agreements
- For **complex transfers**, broader agreements are necessary to reflect interests of parties
 - Cooperative Projects
 - Coproduction/Licensed Production
- Agreement content **negotiated** by parties
 - Binds parties in international law
 - SAMM C11.9 relates use to security cooperation
 - DoDD 5530.3 “International Agreements” applies





Loan

- **AECA, Section 65 permits loans to NATO and major non-NATO allies for **cooperative research and development** purposes**
- **USD (AT&L) is lead for loan agreements**
 - **Must be mutual benefit**
 - **Terms & Conditions similar to the LOA apply**
 - **Test report provided at no charge**
 - **DoDD 5530.3 “International Agreements” applies**



Summary

- **Contract law concepts apply to FMS contractual agreements (LOA)**
- **Standard terms & conditions apply to all LOAs with foreign purchasers**
- **Amendments = minor change in LOA scope**
- **Modifications = non-scope LOA changes**
- **LOIs, leases, international agreements and loans are other documents used in security cooperation**



International Sales Contractual Instruments

END